Honorable Karen A. Overstreet
August 7, 2009; 9:30 a.m.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: CHRISTOPHER PHILLIPS, d/b/a Seattle Eye Surgeons, P.S., d/b/a Lomas LASIK and Eye Surgery Center, Debtor(s).	Chapter 7 Bankruptcy No. 08-14147
STANDARD INSURANCE COMPANY, Plaintiff, v. CHRISTOPHER B. PHILLIPS, Debtor, and NANCY L. JAMES, solely in her capacity as chapter 7 Trustee for Christopher Phillips, Defendants.	Adversary No. 08-01232 MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER OF PARTIAL SUMMARY JUDGMENT REGARDING EXEMPTIONS

COMES NOW defendant and cross-plaintiff, the duly appointed trustee, Nancy James ("Trustee"), through counsel, The Rigby Law Firm, and Rory C. Livesey, and files this memorandum in support of the Trustee's motion for partial summary judgment on the cross-claim against defendant Christopher Phillips (the "debtor") for an order sustaining the Trustee's objection to the debtor's claims of exemption in Standard Insurance Company ("Standard") policy number 00C792466 and in several unliquidated claims against third parties listed on the debtor's schedules.

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I. INTRODUCTION

The debtor filed a Chapter 7 bankruptcy petition in the above-referenced court on July 2, 2008 (Case No. 08-14147).[1] As part of the petition, the debtor filed a Schedule C - List of Exemptions. The Trustee objected to those exemptions on August 15, 2008.

On September 15, 2008, Standard filed a complaint in the above-captioned adversary proceeding seeking rescission of policy number 00C792466 ("Standard Policy") it issued to the debtor pre-petition. The debtor's interest in the Standard Policy was not disclosed in his original bankruptcy petition. After the filing of this adversary proceeding , on September 17, 2006, the debtor amended his Schedule B and listed the Standard Policy. On October 17, 2006, the debtor amended his Schedule C and claimed an exemption in the Standard Policy under 11 U.S.C. § 522(d)(10)(C). On October 31, 2008, the Trustee filed an objection to the amended exemptions asserting that the debtor's claim of exemption in the Standard Policy only after it was disclosed to the trustee was in bad faith and should be denied. Alternatively, the Trustee argues that if the court concludes that the amended exemption was not taken in bad faith, the proper exemption should be 11 U.S.C. § 522(d)(1)(E). That statute limits the exemption of disability payments and allows the debtor to exempt the payments only to the extent reasonably necessary for his support.

In addition to the Standard Policy, the debtor is attempting to exempt several unliquidated claims against third parties under 11 U.S.C. § 522(d)(11)(E). Those claims are briefly described as follows:

1) potential claim against International Optical, et. al., for conversion;
2) potential claim against Dr. Richard Lomas for defamation;
3) potential claim against Dr. Richard Lomas for fraudulent misrepresentation;
4) potential claim for libel and slander against neighbor;

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[1]The trustee is asking the court to consider the evidence presented in hearings related to the debtor including, but not limited to, Adversary No. 08-01338 (*see In re Acequia, Inc.*, 787 F.2d 1352, 1359 (9th Cir. 1896) and take judicial notice. *See, also, In re Schottler*, 251 B.R. 441 (10th Cir. BAP 1991).

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5) potential claims against media for libel and slander; and

6) potential medical malpractice claim against Hazelton Foundation.

These assets were listed on the debtor's original schedules. The Trustee timely objected to those exemptions. The original objection to the exemptions was incorporated into the objection to the amended exemptions filed in response to the disclosure of the Standard Policy.

The Standard Policy is likely the only significant asset of the estate and Standard seeks to rescind it. Since the validity of the Standard Policy and the debtor's claim of exemption in it are inextricably related, the Trustee filed a cross-claim against the debtor in this adversary proceeding to determine his exemptions rather than file a motion in the general bankruptcy which is the normal practice. This motion deals only with the Trustee's objection to the exemption in the Standard Policy on the basis of the debtor's bad faith. The Trustee is not seeking a determination as to the proper amount of the exemption needed for the debtor's support under Section 522(d)(1)(E) and that issue, if needed, shall be left for further order of the court. The Trustee also addresses the debtor's ability to exempt as payment for loss of future wages the unliquidated claims listed on his schedules in this motion.

II. ISSUES PRESENTED

A. Is the debtor's claim of exemption in the Standard Policy made in bad faith?

B. Can the debtor exempt the unliquidated claims against third parties under 11 U.S.C. § 522(d)(11)(E)?

III. ARGUMENT

A. Parties Burden on Summary Judgment.

F.R. Civ. P. 56 applies to this motion. F.R. Bankr. P. 7056. The party seeking summary judgment bears the initial burden of asserting that the pleadings, depositions, answers to interrogatories, admissions and affidavits establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2566, 91 L.Ed 2d 265, 279 (1986).

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The ultimate burden of demonstrating the existence of a genuine issue of material fact, however, lies with the nonmoving party. *Id.* at 324. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Rather, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). These facts must be in the form of "significant, probative evidence tending to support its claim or defense." *In re Aubrey*, 111 B.R. 268, 272 (9th Cir. BAP 1990) (Volinn, J.), quoting *Richard v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations and footnotes omitted). Therefore, in response to the material cited herein in support of the trustee's motion, presenting credible evidence supporting the determination that the debtor's exemptions should be denied, the debtor must respond with credible, significant , probative evidence, and not mere denials, setting forth specific facts showing a genuine issue for trial.

B. Was the debtor's exemption in the Standard Policy made in bad faith?

The U.S. Trustee's Office filed Adversary No. 08-01338 to deny the debtor's discharge because, pursuant to Section 727(a)(2), he acted with the intent to hinder, delay or defraud a creditor or the Trustee when he concealed his interest in the Standard Policy. Additionally, the U.S. Trustee contended that the debtor's discharge should have been denied pursuant to Section 727(a)(4) because the debtor acted knowingly and fraudulently when he made a false oath when he failed to disclose the Standard Policy in his schedules, in the amended schedules and at the Section 341 meeting. After a trial, the court denied the debtor's discharge on both grounds. *See* Declaration of Rory C. Livesey, Exhibit "A."

The court denied the debtor's discharge because he failed to disclose the existence of the Standard Policy on his schedules. The debtor cannot intentionally fail to disclose the existence of an asset on his schedules and then, after the asset is discovered, claim an exemption in it. Claiming

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such an exemption is done in bad faith. The court in the adversary proceeding specifically found that the debtor did not amend his schedules to list the Standard Policy until after Standard had disclosed its existence to the Trustee.

The duty of a debtor to fully and accurately disclose the debtor's financial situation and file accurate and complete schedules is fundamental to the bankruptcy system. *In re Riley*, 2007 Bankr. LEXIS 2776, 13-14 (Bankr. E.D. Wash.). The debtor fell far short of his duty in his failure to disclose the existence of the Standard Policy. As was found by the court in his discharge action, that failure was intentional. Simply put, a debtor is not allowed to later exempt an undisclosed asset if the debtor's failure to disclose arose from the bad faith or an intent to conceal. *Id.* If a debtor shows bad faith, or if third parties are prejudiced by the nondisclosure of an asset, then the bankruptcy court can exercise its discretion to disallow any claimed exemption in the asset, in whole or in part. *In re Lopez*, 283 B.R. 22, 30 (BAP 9th Cir. 2002). More accurately put, concealment of an asset no doubt requires the denial of the exemption claim. *In re Andermahr*, 30 B.R. 532, 533 (9th Cir. BAP 1983).

That the debtor cannot exempt previously non-disclosed assets is wholly appropriate. The operation of the bankruptcy system depends on the honest reporting. If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive. *In re Arnold*, 252 B.R. 778, 785-86 (9th Cir. BAP 2000). The same conduct which resulted in the denial of the debtor's discharge constitutes evidence of bad faith sufficient to reject his attempt to claim an exemption in the Standard Policy. *See In re Bachman*, 2007 Bankr. LEXIS 4616 (Bankr. E.D. Idaho 2007). Bankruptcy rewards the honest debtor. In addressing Section 522(g) of the Bankruptcy Code, the Ninth Circuit stated providing an exemption for this debtor, who fraudulently transferred property and was not honest in reporting his assets or pre-petition transfers, would not promote the specific policy of Section 522(g) or the general polices of the Code. *In re Glass*, 60 F.3d 565, 569 (9th Cir. 1995). Similarly, the debtor's intentional failure to disclose the Standard Policy does not promote the general policy of the Code and it cost him his discharge. To claim an exemption now is clearly bad faith. The trustee's objection the exemption in the Standard Policy should be sustained.

C. The debtor cannot exempt the unliquidated claims under Section 522(d)(11)(E).

As outlined above, the debtor has claimed an exemption under Section 522(d)(11)(E) in various unliquidated claims against third parties for perceived wrongs done him. Specifically, that statute exempts -

> (11) the debtor's right to receive, or property that is traceable to, -
>
> . . . .
>
> (E) a payment in compensation for loss of future earnings of the debtor or an individual of whom the debtor is or was a dependant, to the extent reasonably necessary for support of the debtor or any dependent of the debtor.

11 U.S.C. § 522(d)(11)(E).

These exemptions are also not taken in good faith. The debtor's description of the exemptions are so vague as to be worthless. Attempts by the Trustee to further identify the exemptions have yielded little tangible results from the debtor. *See* Declaration of Livesey, Exhibit "B." At his 2004 examination, the debtor gave lengthy but rambling explanations of the claims. He is claiming 100 percent of an unknown value. Further, the claimed exemption is limited only to loss of future wages and only for wage that would have accrued after the filing of the bankruptcy petition. *In re Jackson,* 394 B.R. 8 (U.S. D.C. Conn. 2008). Under the worst case scenario the estate has some interest in the claims. There is no causal link between the claimed exemption statute and the property the debtor is attempting to exempt. The required degree specificity increases when itemizing property that is claimed as exempt under Section 522. *In re Mohring,* 142 B.R. 389, 395 (Bkrtcy. E.D. Cal. 1992). The Seventh Circuit explains the need for specificity as follows:

> The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to challenge. Debtors are not perfectly trustworthy and unless the claim of exemption contains sufficient

> detail to put the trustee on notice of questionable assertions, it will not be possible to administer the statutory scheme.

Payne v. Woods, 775 F.2d 202 (7th Cir. 1985). The information provided by the debtor does not allow the trustee to reasonably identify the nature of the exemption claim in relation to the assets listed.

The debtor's claim is for lost wages. The debtor's business was already lost. The causes of action identified by the debtor are for slander and defamation. Although the Trustee acknowledges that exemptions are to be liberally construed in favor of the debtor, the debtor must meet a threshold requirement to properly link to the exemption. As was found in the discharge action, the debtor has a serious credibility issue. This exemption is not taken in good faith and the trustee's objection should be sustained.

WHEREFORE, based on the foregoing, the Trustee requests the court enter an order sustaining her objection to the debtor's claim of exemption in the Standard Policy and miscellaneous claims listed on the schedules.

DATED this 14th day of July, 2009.

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/S/ *Rory C. Livesey*

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